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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

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No. [redacted]

T. FRANK SMITH, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

JOHN P. WITSIL
Counsel for Petitioner

May 13, 1964

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INDEX

	Page
Citations to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statement	2
Reasons For Granting the Writ	4
Conclusion	7
Appendix	1a

TABLE OF CASES

Arrant v. Lane, 249 U.S. 367	5
Baxter v. U.S., 122 C. Cls. 632	5
Chisholm v. U.S., decided February 3, 1960, 149 C. Cls. 8	3, 4, 5
Evans v. Leedom, 265 F. 2d 125	5
Henry v. U.S., 153 Fed. Supp. 290	6
Kaufman v. U.S., 118 C. Cls. 91	6
Ritter v. Strauss, 261 F. 2d 767	6
Simon v. U.S., 113 C. Cls. 182	6
Winsberg v. U.S., 120 C. Cls. 511	6

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No.

T. FRANK SMITH, *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, entered in the above-entitled case on February 14, 1964.

CITATION TO OPINION BELOW

The order of the United States Court of Claims (R. 26) is printed in Appendix A hereto, *infra* p. 1a.

JURISDICTION

The judgment of the United States Court of Claims was entered on February 14, 1964, (R. 26). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255 (1).

QUESTION PRESENTED

Whether an Agency of the Federal Government may arbitrarily refuse to grant a civil service employee his rights as decreed under statute and Court decision and when such a refusal results in a delay in the institution of a suit thereon successfully plead the defense of laches when such a defense causes a denial of due process of law and an arbitrary revocation of a property right.

STATEMENT

Petitioner was employed as a Cotton Classer, GS-12, in the Agricultural Marketing Service of the Department of Agriculture, when on November 16, 1956, he received a notice which stated that the Agency planned to separate, demote or reassign him on the basis of his having received an unsatisfactory performance rating. Petitioner appealed his unsatisfactory performance rating in the time allotted. Under date of March 21, 1957, petitioner was informed that his unsatisfactory performance rating had been sustained and that he would be separated from the rolls after the expiration of thirty days from the date of his receipt of the letter. Petitioner was subsequently dismissed under date of April 24, 1957, and immediately applied for retirement which was made effective as of the day following the date of his dismissal. Said letter advised petitioner of his appeal rights in that he could appeal the un-

satisfactory performance rating as well as his proposed separation to the United States Civil Service Commission.

By letter dated April 8, 1957, petitioner appealed his rating and his dismissal to the United States Civil Service Commission. The Statutory Board of Review of the Civil Service Commission, Eighth Region, sustained the issuance of the unsatisfactory performance rating under date of June 18, 1957. Under date of August 9, 1957, the Eighth Region affirmed the dismissal of petitioner. Petitioner asserted to the Civil Service Commission that he was entitled to a review of his dismissal on the merits pursuant to his rights under Section 14, of the Veterans' Preference Act but the Commission refused to so review the matter and restricted its review solely to procedural matters. Petitioner again appealed the matter to the Commission which sustained its prior ruling by decision dated October 18, 1957. Petitioner again asserted his right to be heard on the merits of his dismissal before the Commission and called the attention of the Commission to a decision of the United States Court of Claims in the case of *Chisholm* v. *U.S.*, decided on February 3, 1960, 149 C. Cls. 8, which sustained the position of petitioner that he was entitled to a review on the merits of his dismissal. The Civil Service Commission by decisions dated January 5, 1961, and March 13, 1962, refused to review petitioner's dismissal in the light of the *Chisholm* case. Petitioner filed suit in the United States Court of Claims on November 5, 1962, which Court by Order dated February 14, 1964, dismissed petitioner's suit (R. 26). Said order was based upon the determination of the Court that petitioner's claim was barred by the doctrine of laches.

REASONS FOR GRANTING THE WRIT

Petitioner consistently maintained through the entire avenue of administrative appeal available to him that he was entitled to be heard on the merits of his dismissal pursuant to his rights under the Veterans' Preference Act of 1944. The United States Civil Service Commission arbitrarily refused to consider anything except the procedural aspects of the matter maintaining that petitioner was not entitled to a review on the merits since his performance rating had been determined to be unsatisfactory and an appeal thereof had been considered under the Performance Rating Act procedures. This was the policy of the Civil Service Commission prior to a final decision in the *Chisholm* case, *supra*, when the United States Court of Claims determined that a veteran dismissed on the basis of an unsatisfactory performance rating was entitled to an appeal on the merits under the Performance Rating Act as well as an appeal on the merits under the Veterans' Preference Act of 1944, as amended. This case was pending before the Courts at the time petitioner's dismissal occurred and was decided subsequent to his dismissal, to wit, on February 3, 1960.

The Civil Service Commission was under an obligation to hold the appeal of petitioner in abeyance until a Court ruling on its policy was made or in the absence of so doing was obligated to reopen the appeal of petitioner when the ruling in the *Chisholm* case was handed down. Petitioner with great perseverance pursued this issue before the Civil Service Commission but to no avail. Now, when he has filed a suit before the Courts the doctrine of laches has been applied to dismiss his cause of action through no fault of the petitioner. The doctrine of laches becomes a harsh one

when a right of legal redress is arbitrarily removed from an individual when he has not been responsible for the delay involved. Petitioner's case falls well within the doctrine enunciated by this Court in *Arrant* v. *Lane*, 249 U.S. 367, wherein it was determined that such a defense was valid only where the facts reflect that the party against whom the defense is pleaded did nothing to assert his claim. Herein the petitioner was retired as of the date of his dismissal so that money damages have been held to a minimum. Petitioner consistently pleaded with the Civil Service Commission to apply the law as it read both prior to the decision in the *Chisholm* case and again after the decision therein but the Civil Service Commission refused to so act. Petitioner is now being penalized for the administrative stubborness of an appellate body.

This Court's attention is respectfully directed to the cases of *Baxter* v. *U.S.*, 122 C. Cls. 632, decided in 1952 wherein the plaintiff therein continued to assert his rights as best as he knew how. Identically herein we have a situation wherein the petitioner has continually pleaded that his rights have been violated but the Civil Service Commission has turned a deaf ear and caused a delay for which the petitioner has been penalized by having his case dismissed under the doctrine of laches. Such administrative negligence cannot be permitted to arbitrarily deny a party his day in Court. Such action promotes a denial of due process of law and a violation of statutory rights vested in the petitioner.

Again the case of *Evans* v. *Leedom*, 265 F. 2d 125, supports the position of petitioner herein. Therein the doctrine of laches as a defense was set forth in all

of its properties and reflected that such a defense is valid where there is a showing that the party against whom the defense is pleaded did nothing to assert his rights and that a mere showing of a contemplation to start a legal action is sufficient to thwart the effective use of a defense of laches. The cases of *Winsberg* v. *U.S.*, 120 C. Cls. 511; *Kaufman* v. *U.S.*, 118 C. Cls. 91; and *Simon* v. *U.S.*, 113 C. Cls. 182 all support the position of the petitioner herein. As stated in *Ritter* v. *Strauss*, 261 F. 2d 767, when a government employee has been discharged in violation of his legal rights, he should not be held to have forfeited these rights by lack of diligence unless there are strong equities which override these rights and the circumstances of the delay must be examined. Here the delay in filing suit was caused by an administrative body which refused to apply the law and this delay has caused petitioner to pursue his remedy here before this Court since laches has caused the dismissal of his case in the United States Court of Claims.

Again the case of *Henry* v. *U.S.*, 153 Fed. Supp. 290, supports the petitioner against the invocation of the defense of laches. Therein the rule was set forth that a mere delay in asserting rights is not sufficient to establish a defense of laches. There must be a showing that an injury has occurred by reason of the delay and irreparable damage been done. Herein, the petitioner has minimized the monetary damage to the Agency involved because he retired effective the same date as his dismissal. The payment of an annuity over this period of time has decreased any damage to the Agency's budget; petitioner now has sought only to clear his name and obtain any additional benefits for his annual annuity which could be increased by a

successful verdict herein. To allow the Agency, the Civil Service Commission and the Courts to dismiss petitioner's claim by permitting the application of the doctrine of laches is a denial of due process of law and has deprived the petitioner of a property right on the basis of an administrative fiat not found in the law. The defense of laches is an equitable remedy and has had its foundation and life nurtured by the underlying principle of justice. It is a basic maxim of Equity that he who seeks equity must so do with clean hands. The hands of Respondent are not clean when an instrument thereof has arbitrarily refused to apply the law to an administrative appeal and then when legal redress is sought thereon to plead an equitable defense. Such a defense is not available when the hands of Respondent are not clean. Such a defense is not available when there is a denial of due process of law. Such a defense is not available when an invocation thereof would thwart the intent of Congress.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN P. WITSIL
Counsel for Petitioner

May 13, 1964

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 353-62

T. FRANK SMITH

v.

THE UNITED STATES

Order

This case comes before the court on defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment. Upon consideration thereof, together with oral argument of counsel and the briefs of the parties, it is concluded that plaintiff's claim is barred under the doctrine of laches, and

IT IS ORDERED that defendant's motion for summary judgment be and the same is granted, plaintiff's cross-motion for summary judgment is denied, and plaintiff's petition is dismissed.

BY THE COURT
MARVIN JONES
Chief Judge

Feb. 14, 1964

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1106

T. FRANK SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ORDER BELOW

The order of the Court of Claims (Pet. App. 1a; R. 26) is not reported.

JURISDICTION

The order of the Court of Claims was entered on February 14, 1964 (Pet. App. 1a; R. 26). The petition for a writ of certiorari was filed on May 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether petitioner's action for back pay, instituted more than five years after the Civil Service Commis-

735-522—64

sion had upheld his dismissal from his Civil Service position, is barred by laches.

STATEMENT

On November 16, 1956, petitioner, then a Cotton Classer in the Department of Agriculture at a salary of $8,645 per year, was furnished a statement of reasons for a rating of unsatisfactory performance and prospective separation, demotion or reassignment (R. 1–2, 6–7). Petitioner filed an appeal under the department's regulations. On March 21, 1957, the department sustained the rating and notified petitioner that he would be separated from the rolls as of April 24, 1957, and he was so separated (R. 2, 6–7).

On April 8, 1957, petitioner noted an appeal to the Eighth Region, Civil Service Commission (R. 2, 7). The Statutory Board of Review, after a hearing, held on June 18, 1957, sustained the rating. On August 9, 1957, the Eighth Region issued its decision affirming the department's separation action and refusing to review the adequacy and validity of the department's stated reasons for the unsatisfactory rating (R. 2, 7). On August 15, 1957, petitioner appealed the Eighth Region's decision (R. 3, 7), and on October 18, 1957, the Board of Appeals and Review of the Civil Service Commission denied the appeal (R. 3, 7).

On several occasions after July 28, 1960, petitioner requested the Commission to reopen and reconsider the decision. The Commission, in letters dated January 5, 1961, and March 13, 1962, refused (R. 3, 7–8).

Prior to the instant proceeding to recover back pay, brought in the Court of Claims on November 5, 1962 (R. 1), petitioner filed no judicial proceedings to challenge the Commission's decision of October 18, 1957.

On the government's motion, the Court of Claims entered an order dismissing the action on the ground of laches (Pet. App. 1a; R. 26).

ARGUMENT

The decision below, holding petitioner's claim barred because of his five year delay in filing suit, is plainly correct. It follows principles established by this Court in *Arant* v. *Lane*, 249 U.S. 367, and consistently applied since then. There is no occasion for further review of these principles or their application to the present case.

As already noted, petitioner was separated from his employment with the Department of Agriculture on April 24, 1957, after a notice of unsatisfactory performance on November 16, 1956. A series of administrative appeals culminated, on October 18, 1957, in an order by the Board of Appeals and Review of the Civil Service Commission, denying petitioner relief. Nevertheless, petitioner took no further action until November 5, 1962, more than five years after the administrative decision.

Since petitioner seeks back pay from the date of his separation, this delay has clearly prejudiced the government. Regard for the public purse requires an employee to pursue his claim diligently, or his remedy will be lost even where serious procedural and substantive irregularities are alleged. *Arant* v. *Lane*,

249 U.S. 367 (22 months' delay); *Drown* v. *Higley,* 244 F. 2d 774 (C.A.D.C.) (over two years' delay).

As the cases indicate, much shorter intervals than the five-year period involved here have consistently been held to bar subsequent litigation. *Arant* v. *Lane,* 249 U.S. 367 (22 months); *Bovard* v. *United States,* C. Cls. 241–60, February 6, 1963 (14 months after an intervening district court suit and 54 months after exhausting administrative remedies); *Morse* v. *United States;* 59 C. Cls. 139, 155 (14 months); *Grasse* v. *Snyder,* 192 F. 2d 35 (C.A.D.C.) (16 months); *Drown* v. *Higley,* 244 F. 2d 774 (C.A.D.C.) (over 2 years); *Jones* v. *Summerfield,* 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841 (33 months); *Plunkett* v. *United States,* 58 C. Cls. 359, 370 (37 months); *Evans* v. *Leedom,* 265 F. 2d 125 (C.A.D.C.), certiorari denied, 361 U.S. 935 (38 months).

Petitioner's delay is not excused, of course, by the fact of intervening correspondence with the Civil Service Commission. This is especially so since petitioner did not commence writing to the Commission until July 28, 1960, more than 33 months after the decision of October 18, 1957, and five months after the decision in *Chisholm* v. *United States,* 149 C. Cls. 8, from which he claims support. But in any event, as stated in *Jones* v. *Summerfield,* 265 F. 2d 124, 125 (C.A.D.C.), certiorari denied, 361 U.S. 841:

> His suit was not brought in a proper forum until thirty-three months had elapsed after his discharge, and some 17 months after the decision in Cole v. Young. The letters to various admin-

istrative officials do not excuse his delay in bringing suit [citing authorities].

See also, *Evans* v. *Leedom*, 265 F. 2d 125 (C.A.D.C.); *Davis* v. *Tennessee Valley Authority*, 214 F. Supp. 229 (N.D. Ala.), affirmed, 313 F. 2d 959 (C.A. 5), certiorari denied, 375 U.S. 818.

In the circumstances it seems plain that the court below properly held the present claim barred by laches.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1964.

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